

Internal Revenue Service
memorandum

TL-N-9995-81
JIRosenberg

date: DEC 6 1989

to: District Counsel, Washington, DC MA:WAS
Attn: Dianne Crosby

from: Assistant Chief Counsel (Tax Litigation) CC:TL

subject: [REDACTED] v. Commissioner, Docket Nos. [REDACTED], [REDACTED]

This memorandum responds to your request for tax litigation advice dated September 12, 1989.

Issues

1. Whether the Service has authority to assert I.R.C. § 6621(c) additional interest in a statutory notice of deficiency for the years in which section 6621(c) is the only issue being asserted and for the years in which only section 6651 and section 6621(c) are being asserted.
2. Whether I.R.C. § 6621(c) additional interest may be assessed and collected as regular interest, notwithstanding the expiration of the statute of limitations on the assessment of a deficiency for the same years.
3. Whether the Service is foreclosed from assessing the section 6621(c) additional interest under the doctrines of accord and satisfaction or equitable estoppel.

Conclusion

1. The Service does not have authority to assert I.R.C. § 6621(c) additional interest in a statutory notice of deficiency for the years in which section 6621(c) is the only issue being asserted nor for the years in which only section 6651 and 6621(c) are being asserted. Moreover, since there is no underpayment raised in the notice of deficiency before the Court that is attributable to a tax motivated transaction, the Tax Court would not have jurisdiction to determine the applicability of section 6621(c). See I.R.C. § 6621(c)(4).
2. The section 6621(c) additional interest may be assessed and collected as regular interest, notwithstanding the expiration of the statute of limitations on the assessment of a deficiency for the same years. The Service has six years from the assessment of the underlying tax to assess and collect the interest. I.R.C. § 6601(g), 6502(a).

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3. The Service is not foreclosed from assessing the section 6621(c) additional interest under the doctrines of accord and satisfaction or equitable estoppel.

Facts

The petitioners were investors in [REDACTED] [REDACTED] during the years [REDACTED]. The losses from the investment for the years [REDACTED] were resolved by the courts in [REDACTED].

The current docketed cases involve the taxable years [REDACTED] through [REDACTED]. 1/ Prior to the expiration of the time prescribed by section 6501(a) for assessment of income tax for the years at issue, petitioners, or their authorized representative, and respondent timely executed written agreements to extend the statute of limitations on assessment pursuant to section 6501(c)(4).

Petitioners received 30-day letters with proposed deficiencies and the two penalties at issue herein: the late filing addition to tax under section 6651(a) and the increased rate of interest under section 6621(c). On [REDACTED], the taxpayers' representative agreed to the deficiencies, but disagreed with the two penalties. Forms 870 for all [REDACTED] years were signed by the taxpayers' representative for the amounts of the deficiencies only. Pursuant to these agreements the income tax deficiencies and regular interest (but not the section 6621(c) interest or the section 6651 addition to tax) were assessed on [REDACTED], for all [REDACTED] years.

One year later, petitioner obtained a cashier's check dated [REDACTED], in the amount of \$[REDACTED], which apparently represented the total amount of the income tax deficiencies (plus regular interest) to which petitioners had previously agreed. This check was received by Revenue Officer W.G. Pender on [REDACTED], who sent the taxpayers a letter dated [REDACTED], in which he explained the application of the funds and stated that "Your payment satisfied all assessments and accruals to [REDACTED]." Revenue Officer Pender also wrote on the face of the check: "Received for payment in full of tax, penalties and interest for [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED] (1040) W.G.

1/ Docket No. [REDACTED] involves petitioner [REDACTED] and his spouse, [REDACTED] for the years [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. Docket No. [REDACTED] involves only petitioner [REDACTED] for the year [REDACTED].

Pender [REDACTED]." The transcript of account shows that payments were posted as of [REDACTED]

On [REDACTED], the Service issued a statutory notice of deficiency to petitioner [REDACTED] asserting sections 6621(c) and 6651 for the [REDACTED] taxable year. On that same date the Service also issued a statutory notice of deficiency to petitioners [REDACTED] and [REDACTED] for the [REDACTED] through [REDACTED] taxable years. In this statutory notice the Service asserted sections 6621(c) and 6651 for the years [REDACTED] and [REDACTED] and asserted only section 6621(c) for the years [REDACTED] through [REDACTED]. The petitions in both cases were timely filed with the Court on [REDACTED].

Issue 1

In cases where I.R.C. § 6621(c) is the only unagreed issue remaining, it is the Service's position that a statutory notice of deficiency should not be issued solely asserting section 6621(c). The basis for this position is that section 6621(c) simply provides for an increased rate of interest on substantial underpayments attributable to tax motivated transactions. Section 6601(e) excludes interest from the deficiency procedures under subchapter B of chapter 63. Compare I.R.C. § 6662, 6671. 2/ Accordingly, the Service does not have authority to issue a statutory notice of deficiency covering only interest since interest is not included within the definition of a deficiency under section 6211(a). See I.R.C. §§ 6212(a), 6601(e)(1).

An additional reason that section 6621(c) cannot be the sole subject of a statutory notice of deficiency is that the Tax Court would not have jurisdiction over a petition pertaining only to section 6621(c) interest. With a few exceptions, the Tax Court only has jurisdiction over "taxes which are the subject of the issuance of a notice of deficiency by the Commissioner." T.C. Rule 13. See also I.R.C. § 6214(a). Generally, the Tax Court does not have jurisdiction over interest. Transport Manufacturing & Equipment Co. v. Commissioner, 434 F.2d 373, 381 (8th Cir. 1970); Commissioner v. Kilpatrick's Estate, 140 F.2d 887 (6th Cir. 1944); Engh v. United States, 658 F. Supp. 698 (N.D. Ill. 1987).

2/ Section 6621(c) is found in the interest provisions under chapter 67. Section 6601(e) excludes interest from the deficiency procedures of subchapter B of chapter 63. In contrast, sections 6662 and 6671 do not exclude, as a general rule, the additions to tax, additional amounts, and assessable penalties in chapter 68 from the deficiency procedures.

Congress did, in [REDACTED], extend the court's jurisdiction to allow it, in any proceeding in the Tax Court to redetermine a deficiency, to determine the portion of such deficiency which is a substantial underpayment attributable to a tax motivated transaction. I.R.C. § 6621(c)(4). However, Congress did not amend the definition of a deficiency under section 6211 to include a determination under section 6621(c), nor did Congress amend section 6601(e) to make the deficiency procedures apply to section 6621(c) interest. Therefore, despite section 6621(c)(4), the Tax Court would not have jurisdiction over a petition pertaining only to section 6621(c) since there is no underpayment that gives rise to a "deficiency" to which section 6621(c) could relate.

As discussed above, if section 6621(c) is the only unagreed issue left, the Service should not issue a statutory notice of deficiency. However, in some cases there may be other issues remaining to which the taxpayer does not agree. One type of case scenario is where the taxpayer pays the underlying tax but refuses to agree to the section 6621(c) interest and an asserted addition to tax, such as the addition to tax for negligence under section 6653 or the addition to tax for a valuation overstatement under section 6659. The deficiency procedures do apply to these additions to tax, and the additions cannot be assessed without the issuance of a statutory notice of deficiency. See I.R.C. §§ 6213(a), 6662. 3/

Even with the additions to tax in the statutory notice of deficiency, a literal reading of section 6621(c)(4) leads to the conclusion that the Tax Court would still lack jurisdiction over the section 6621(c) issue. The statute provides: "In the case of any proceeding in the Tax Court for a redetermination of a deficiency, the Tax Court shall also have jurisdiction to determine the portion (if any) of such deficiency which is a substantial underpayment attributable to tax motivated transactions." I.R.C. § 6621(c)(4) (emphasis added). Additions to tax do not constitute a "substantial underpayment attributable to a tax motivated transaction." Temp. Treas. Reg. § 301.6621-2T, A-12. Consequently, assertion of additions to tax would not give rise to an underpayment that could be subject to section 6621(c). Therefore, if the underpayment allegedly attributable to a tax motivated transaction is not raised in the notice and is

3/ There can be "deficiencies" of additions to tax for purposes of section 6212(a) (authorizes Service to issue a notice of deficiency) and section 6213(a) (restricts assessment of deficiency). See I.R.C. § 6662; Enochs v. Muse, 270 F.2d 528 (5th 1959); Strawberry Hill Press, Inc. v. Scanlon, 172 F. Supp 335 (E.D. N.Y. 1959); Rev. Rul. 78-20, 1978-1 C.B. 441.

not before the court, the court would not have jurisdiction to determine the applicability of section 6621(c).

For example, if the negligence addition to tax and section 6621(c) are the only unagreed issues under the above scenario, a statutory notice of deficiency covering the negligence addition to tax must be issued before it can be assessed. I.R.C. §§ 6213(a), 6662. If such a notice is petitioned, the underpayment of tax which allegedly falls under section 6621(c) would not be at issue. Thus, there would be no deficiency before the court within the purview of section 6621(c)(4).

In the present cases, based upon the above analysis, we conclude that the Tax Court has no jurisdiction over the section 6621(c) additional interest for the years [REDACTED] through [REDACTED]. In each of the years in which the section 6621(c) interest is asserted, section 6621(c) is either the only issue asserted in the statutory notice of deficiency, or it is asserted along with the section 6651(a) late filing addition to tax. There is no underpayment raised in the notice of deficiency or before the court that is attributable to a tax motivated transaction. Therefore, the court would not have jurisdiction pursuant to section 6621(c)(4) to determine the applicability of section 6621(c).

Since the section 6651 addition to tax is in Chapter 68, Subchapter A, entitled "Additions to the Tax and Additional Amounts," and it is attributable to a deficiency in tax described in section 6211, the deficiency procedures will apply to the assertion of section 6651. See I.R.C. § 6662(b)(1); DiRezza v. Commissioner, 78 T.C. 19 (1982). Thus, the statutory notice of deficiency is valid for the years in which section 6651 is asserted, and the Court will have jurisdiction to determine its applicability.

In view of our conclusion that the Court lacks jurisdiction over the section 6621(c) additional interest for the years [REDACTED] through [REDACTED], we recommend that in Docket No. [REDACTED] a motion to dismiss for lack of jurisdiction only as to section 6621(c) should be filed with the Court since, as stated above, the court still has jurisdiction over section 6651. In addition, a motion to dismiss for lack of jurisdiction should be filed in Docket No. [REDACTED]. The motion should be to dismiss only section 6621(c) for the years [REDACTED] and [REDACTED] since the court will have jurisdiction over section 6651. The motion should also be to dismiss the case outright as to the years [REDACTED], [REDACTED] and [REDACTED] because the section 6621(c) additional interest was the only issue asserted for those years.

Issue 2

The next issue to be addressed concerns whether the Service may assess the section 6621(c) additional interest notwithstanding that assessment of a deficiency for the years in question may be barred by the statute of limitations under section 6501.

Interest, including section 6621(c) interest, is not independently subject to the deficiency procedures, including the restrictions on assessment and collection. See I.R.C. § 6601(e)(1). If no restrictions remain on the assessment and collection of the underlying deficiencies, there are no restrictions on the assessment and collection of the interest. I.R.C. § 6601(g). Therefore, interest, including section 6621(c) interest, should be assessed and collected under normal procedures. The Service has six years from the assessment of the underlying tax to assess and collect interest. I.R.C. §§ 6601(g), 6502(a).

In the present case, the tax to which the interest relates was legally assessed for all [REDACTED] years on [REDACTED]. Accordingly, pursuant to section 6601(g) the interest related to this tax may be collected for up to [REDACTED] years thereafter. Thus, the Service has until [REDACTED] to collect the section 6621(c) additional interest in this case.

Issue 3

The final issue to be addressed is petitioners' claim that there was an accord and satisfaction as to all the years in dispute or that the Service was equitably estopped from assessing and collecting the additions to tax at issue. Petitioners' claim is based on their interpretation of language written on the face of the check used to pay the income tax deficiencies and the letter received from Revenue Officer Pender explaining the allocation of the proceeds of the check.

We have reviewed your discussion of this issue in your memorandum requesting this tax litigation advice, which we found to be complete and thorough. We agree with your conclusions that there was no accord and satisfaction and that the Service was not equitably estopped from assessing and collecting the additions to tax at issue for all the reasons stated in your memorandum.

Should you have any further questions regarding this matter, please contact Jeff Rosenberg at 566-3233.

MARLENE GROSS
Assistant Chief Counsel
(Tax Litigation)

By:



CURTIS G. WILSON
Senior Technical Reviewer
Tax Shelter Branch
Tax Litigation Division